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ABSTRACT

To determine whether U.S. Supreme Court judges have a systematic attitude toward court cases dealing with the law of newsgathering and fair trial-free press, and whether that attitude can help predict the outcome of the pending case Press-Enterprise Co. v. Superior Court (II), this paper applies an attitudinal theory from the field of social psychology to judicial behavior in relevant court cases. Relevant legal theories, extensive methodology, and access to the judicial process are discussed, followed by an in-depth consideration of the Press-Enterprise v. Superior Court case (in which media sought access to sealed transcripts of a murder trial in progress) and a prediction of the outcome. The ensuing discussion notes that: (1) an attitudinal theory can be applied by ascertaining the attitudes of the justices, explaining their past behavior, and predicting their future behavior; (2) the attitudinal referent of First Amendment access to pretrial hearings can be satisfactorily scaled, on which the outcome of the Press-Enterprise v. Superior Court case can be predicted; and (3) if the prediction that media will win by a vote of 6 to 3 proves true, the attitudinal theory still will be not be "proven"--either outcome will merely provide a measure of confirmation in a system of competing theories with differing levels of explanation. (JD)

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A PREDICTION FOR THE OUTCOME OF

PRESS ENTERPRISE CO. V. SUPERIOR COURT (II)

ED274966

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A PREDICTION FOR THE OUTCOME OF

PRESS-ENTERPRISE CO. V. SUPERIOR COURT (II)

A proliferation of legal studies during the past decade has attempted to explain the U.S. Supreme Court's approach to the issue of whether or to what degree the press and public have a right or privilege to have access to places and information.[1] The authors of these studies have hoped to provide guidance for the courts, litigants and potential litigants in their consideration of how constitutional or common law provides for or limits one's ability to obtain information about public affairs.[2]

However commendable and valuable these scholarly efforts have been, they neither fully account for the present system for the free flow of information nor bring desired predictability to the law because the authors have ignored perhaps the most significant single influence on the system: the attitudes of the justices at the Supreme Court of the United States toward the objects and situations in the relevant constitutional law cases.

The purpose of this study is to apply an attitudinal theory out of the field of social psychology to judicial behavior at the Court in cases dealing with the law of newsgathering and fair trial-free press in order to determine: (1) Whether justices have a systematic attitude toward the area and (2) whether that attitude can help predict the outcome of Press-Enterprise Co. v. Superior Court (II), a case pending before the Court.[3]

The timetable for the AEJMC Law Division paper competition

provides a helpful experimental setting for applying a theoretical approach in the prediction of a case outcome. The Supreme Court accepted Press-Enterprise II for review on Oct. 15, 1985;[4] the case was argued Feb. 26, 1986.[5] A decision is likely toward the end of the 1985 term, probably in June and well after this paper was written and judged. The paper's presentation in August, if it is accepted, should consist of a discussion of any differences between the predicted and actual outcomes. As Milton Friedman argued: "The only relevant test of the validity of a hypothesis is comparison of prediction with experience."[6]

Predicting the results of Supreme Court cases is more than an academic exercise of an abstract theory out of social psychology;[7] it is, to the contrary, the most practical sort of jurisprudence, for what is a good lawyer than one who can provide his or her client with the most accurate estimation of the client's chances for success in the judicial system?[8] Tailoring legal arguments to strike responsive chords in the minds of the justices or judges certainly has been a common, albeit largely untaught, strategy for ambitious attorneys for many years. Appeasing the reluctant justices while reinforcing the attitudes of favorable justices (or at least not offending any members of the Court) certainly should enhance the position of the petitioner or respondent. A successful brief writer knows how to cite, in a complimentary way, all of the justices.

As this paper may help demonstrate, it is in fact the traditional legal scholars and practitioners who may be deluding themselves and others into believing that principled and persuasive

arguments alone can make more difference than a thorough understanding of the jurist's predilictions toward the fundamental object or subject of debate.[9]

Theory

Professors Donald M. Gillmor and Everette E. Dennis have discussed the differences between legal and scientific or social scientific theories and have encouraged scholars in mass communication law to consider utilizing nontraditional models in their work.[10] Gillmor and Dennis, however, carefully distinguish and defend the legal theory in the law's own terms, suggesting that the theoretical differences between legal scholars and their more scientific counterparts are resolvable and worth preserving, especially given the nature of communication between law school graduates.[11]

What a Chafee, Emerson or Meiklejohn has to say about a difficult First Amendment situation is what a judge wants to hear when he or she asks for theoretical support for an argument, according to Gillmor and Dennis,[12] but from the social psychologist's point of view, the judge may be seeking a rationalization or reinforcement of his or her ultimately predictable answer to the case at hand. Admittedly, most judges are devoted to the tenets of common law and, like journalists seeking to divest themselves of personal feelings in order to achieve "objectivity," do their best to defer to the Constitution, the legislature, the executive and stare decisis.[13] But the courts are an important part of the political system that allocates the resources of a society, and they operate in an atmosphere thick with political concerns.[14] Furthermore, judges cannot

simply and totally rid themselves of the political, religious, social and economic backgrounds that help shape the discovery of facts, the formulation of the legal issue, the nomenclature of the holding and the logic and direction of the reasoning. Many studies have established beyond significant doubt that judges vote in measureably consistent patterns that bare their attitudinal preferences for particular political policy, their facade of brilliantly woven legal opinions to the contrary not withstanding.[15]

The contrasts between traditional legal researchers, who represent the consensus of scholarship in law generally and law of mass communication, and judicial behavioralists, who thrive in progressive political science departments, boil down to obvious differences in their theoretical orientations. The traditionalist seeks to prescribe the law by tracing a piece of semantics that forges, naturally or artificially, its way through primary legal materials, mainly court opinions, to support the prescription.

While the traditionalist disregards less elevated concerns, for example, whether a judge is a Republican or Democrat, Catholic or Jew, former practicing attorney or politician, the behavioralist gives priority to describing the law by using these and other realities as variables--after a review of the legal text to ascertain the attitudinal referent. Whether one school of thought is more successful than the other is determined not so much in comparison of whether the traditionalist's doctrine is adopted by a court and whether the behavioralist's prediction is accurate but rather in a discussion of the relative merits of predicting the law without knowing the chances

for adoption of the doctrine as opposed to predicting the law with the added knowledge of the judicial mind. At the very least, the former without the latter is an unnecessary struggle.

Traditional theories abound and have had, at best, a mixed record for success.[16] The behavioralists, on the other hand, have been known to predict with 90 percent accuracy the outcomes of U.S. Supreme Court cases.[17] The lack of application of the tools of judicial behavioralism in mass communication areas[18] and in political science (because of the lack of interest in substantive areas of law) suggests much work should be done. Given the thorny, ambiguous and hazardous body of law that has grown in the area of the law of news-gathering, the time seems ripe for some behavioralistic inquiry into at least the immediate future for the right of access.

Methodology

Also recommending this study is the judicial behavioralist's encouragement for the refinement of attitudinal scales, both temporally and substantively. Rohde and Spaeth have established dozens of scale categories to understand the Burger Court just as the pioneering Schubert had studied the Vinson and Warren courts and the numerous dimensions of the broader scales of political and economic freedoms.[19]

The unit of analysis is the Supreme Court case dealing with the confrontations between the First Amendment right of the press and public to obtain and disseminate information and the right of the government to prevent harm the asserted right may pose for society or an individual. Cases brought before the Court may be

regarded as questions with two possible answers, one favorable and one unfavorable, for the litigant arguing his or her freedom of speech or press had been violated. Votes on the issues are counterparts of the external and internal values held by the justices.[20]

Each case contains a First Amendment question, the possible answers to which parallel the value of the votes cast in regard to the First Amendment issues, and the value of the favorableness of the case outcome to the same issues should reveal the value the justices place on those issues.[21] The sample includes 12 nonunanimous cases[22] affecting the law of newsgathering and fair trial-free press decided by the Supreme Court beginning with the October 1971 term and ending with the October 1983 term. The first case decided by the Burger Court in this area was Branzburg v. Hayes in 1972[23] and the last case was Patton v. Yount in 1984.[24]

The period represents an unusual time of membership stability at the Court. Behavioralists find uninterrupted nine-member courts the most appropriate for analysis, avoiding the difficulty of comparing justices who never served together.[25] During the 1972-84 period, only 11 justices served on the Court, including Chief Justice Warren Burger and Associate Justices William Douglas, William Brennan, Potter Stewart, Byron White, Thurgood Marshall, Harry Blackmun, Lewis Powell, William Rehnquist, John Paul Stevens, and Sandra Day O'Connor. Douglas and Stewart's retirements and Stevens and O'Connor's installations, of course, will present a problem for prediction, but that will be addressed below.

The possible outcomes for the cases are favorable or unfavorable for the parties arguing their freedoms of speech and

press had been violated. The individual votes of the justices were determined by whether they voted for or against the First Amendment claimant. A third alternative is nonparticipation when a justice abstained from voting in a case.

One objective of the study will be to establish whether attitudes of Burger Court justices help determine their votes in the cases. Guttman scaling is a means of combining values of several variables or items into a composite measure and analyzing the underlying operating characteristics of three or more items in order to determine whether their interrelationships meet several specified properties defined by the scale.[26]

The scale must be unidimensional, i.e., the component items must all measure movement away from or toward a single underlying object or situation. In this case, the objects are the governmental entities and the press and the subjects are fair trial-free press and the legal reach of newsgathering. Guttman scales are cumulative, which implies that component items can be ordered in degree of favorableness, and justices who reply favorably to a difficult case will always respond favorably to less difficult cases, and vice-versa.[27]

The first function of Guttman scaling is the ordering of cases in degree of difficulty. The ordering is simply a function of the decreasing proportion of justices who vote favorably. The second case, for example, should be a case with a more difficult question than the first case because fewer justices voted favorably (or unfavorably, depending on which end of the scale is under examination). After the cases have been ordered, the scale must

be tested for consistency of voting by the justices. A perfectly consistent pattern of voting will result in a table with symmetrical upper left and lower right halves. Given such a perfect matrix, it may be assumed that the respondents voted as they did because of their attitudes toward the issue contained in the cases.[28]

Such a table is rarely duplicated in the real world; some votes are bound to deviate from perfectly consistent patterns. The number of deviations ("errors" or "inconsistencies") from the voting pattern is measured by a coefficient of reproducibility, the formula for which is

$$CR = 1 - \frac{E}{V}$$

where CR is the coefficient of reproducibility, E is the total number of errors, and V is the total number of votes cast in cases in which there was at least one dissenting vote.[29] The higher the coefficient of reproducibility, the better the scale. If, in the present study, CR = .90 or better, then a fundamental assumption about the study may be retained, i.e., votes of Burger Court justices in these cases may be determined by their attitudes toward the objects or subjects.[30]

A justice's value system--his or her distinctive pattern of support of non-support for certain values that explain his or her votes--can be measured by the justice's location on a scale whose values range from +1.00 to -1.00; a justice who always votes favorably would score +1.00. Scale scores are a function of a justice's scale position in relation to the number of cases making up a scale. Scale position is defined as the midpoint between a justice's last consistent positive vote and his or her first consistent negative vote. The formula for a scale score is

$$S = \frac{2P}{n} - 1$$

where S is the scale score, P is the scale position, and n is the number of cases in the scale.[31] A scale score can help predict an individual justice's vote in future cases.

Access to the Judicial Process

Two major issues in press law have merged into the primary issue in the case whose outcome is to be predicted in this paper. The first question deals with prejudicial publicity and its effect on potential jurors whose impartiality is guaranteed by the Sixth Amendment to a criminal defendant. To what degree should or can limitations be placed on the news media's rights or privileges to report on the criminal justice system to reduce threats to the fair trial rights of the defendant?[32]

The second major issue involves whether or to what degree the news media have a right of access to newsworthy places or information. Adjudication of cases dealing with the dissemination of information has been much more common than adjudication of cases dealing with the gathering of information for publication. At any rate, both have been integrated in Press Enterprise II: more specifically, Do the news media have the First Amendment right of access to a pretrial hearing when dissemination of information about the hearing threatens to violate a criminal suspect's right to be tried before an impartial jury assured by the Sixth Amendment? A brief review of Supreme Court cases in this area will be followed by a close look at the case itself.

Despite a lack of empirical evidence in support of the notion that news media coverage of pretrial and trial events can prejudice potential and sitting jurors against a criminal defendant,[23] the U.S. Supreme Court on at least three occasions has found media coverage so extensive, intensive and biased that convictions have been reversed. In Marshall v. United States,[34] Irvin v. Dowd,[35] and Sheppard v. Maxwell,[36] the Court found a "pattern of deep and bitter prejudice" in communities from which jurors were selected and "bedlam"[38] in courtrooms themselves. The news media's interest in criminal cases had led to irresponsible and sensational reporting, but the Court has been reluctant to sanction restraints directly on the press. Instead, the Court has required trial courts to exhaust alternative means of reducing prejudice before considering solutions possibly destructive to First Amendment rights of the press. The Court has recommended, for example, continuance, change of venue, sequestration of the jury, judicial admonitions to jurors and the press, gag orders on officers of the court and trial de novo as prerequisites for employment of the more drastic gag orders or contempt citations against the news media.[39]

The mere existence of plentiful and even inflammatory media coverage of a trial and its previous events, however, is insufficient to establish a violation of the Sixth Amendment rights of a criminal defendant.[40] Indeed, in the situation where a judge feels compelled to restrain the press, he or she must accurately predict the remedy would be successful and ascertain whether the coverage would in fact have been prejudicial and a "clear and present danger" to the fair trial rights of the defendant.[41]

Fear of prejudicial publicity also has caused judges to limit access of the news media to courtrooms and, at least temporarily, to transcripts of those proceedings. In Gannett v. DePasquale,[42] Justice Potter Stewart, writing for the divided Court, said that the press and public had neither First Amendment "free press" nor Sixth Amendment "public trial" rights to require access to an evidentiary proceeding during which possibly inadmissable evidence would be discussed.[43] The Court was less sympathetic with the defendant's jeopardy in Richmond Newspapers, Inc. v. Virginia[44] in which a trial court judge, without a hearing or any due process for media petitioners, closed a courtroom during a trial to protect against the possibility that presence by the press and public would cause a mistrial. The Court asserted that American courts have always presumed openness in trials and that the First Amendment rights of the press and public had to be reckoned with by demonstrating an overriding counter interest in closure.

Richmond was the first case in which the Court sustained the press in its constitutional argument that it enjoyed a First Amendment right of access to any place. The Court previously had rejected the First Amendment right to travel to Cuba to gather information about American foreign policy[45] and the right of the press to interview prisoners and visit prisons[46] and jails.[47] Prior to Richmond, the most favorable statement from the Court on the issue came in Branzburg v. Hayes.[48] In dicta in the majority opinion, Justice White said he would disagree "that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be

eviscerated."[49] But the Branzburg Court concluded that journalists had no First Amendment right to refuse to testify when subpoened by a grand jury investigating the commission of crime.[50]

Richmond, in fact, was followed two terms later by Globe Newspaper Co. v. Superior Court,[51] the majority opinion for which suggested that the First Amendment right of access could extend to situations other than criminal trials,[52] although at least Justice Sandra Day O'Connor felt that this extension should not be interpreted from either Richmond or Globe.[53]

The issue in Globe turned on the privacy rights of sex offense victims in their testimony in the courtroom. To protect the minors from the trauma of testifying before the public and press, a judge ordered that that portion of the trial be cleared over the objection of the news media. The Supreme Court, however, ruled that a Massachusetts statute that mandated closure in such situations was unconstitutional under the First Amendment, but that a statute that provided discretion to a judge to close a courtroom in the face of a "compelling government interest" would be constitutional.[54]

Privacy was also the countervailing interest balanced against the First Amendment right to report on judicial proceedings and records in Cox Broadcasting Corp. v. Cohn,[55] Nixon v. Warener Communications, Inc.,[56] and Press-Enterprise v. Superior Court (I).[57] In Cox, the Court refused to hold a television station liable in an invasion of privacy action when its reporter broadcast the name of a minor rape and murder victim in contravention

of a Georgia statute. The Court held that the First Amendment protected accurate reports of legally obtained and truthful information. In Nixon, the Court ruled that neither common law nor constitutional law commanded that the Watergate tapes, which were played as evidence in an open courtroom, must be copied on demand for the news media since Congress, through the Presidential Recordings and Materials Preservation Act,[58] had asserted control over the tapes. But the Court also refused to rule that Nixon's expectation of privacy in recording the tapes should prevent the release of the tapes.

Finally in Press-Enterprise I, the Court decided that the prospective invasion of privacy of jurors was insufficient cause to justify closure of voir dire examinations of jury candidates in a criminal trial.

The Court clearly has bestowed legitimacy on the genuine or imagined power of the press to influence the attitudes of at least jurors by reversing convictions on grounds that pretrial and during-trial publicity about cases raised doubt about the fairness in the judicial system.[59] More than compilations of even inaccurate and sensational reporting is necessary to convince the Court to decide that a defendant's Sixth Amendment right to an impartial jury has been violated. The extent and nature of the publicity and the integrity of jurors during voir dire apparently have to be carefully scrutinized before the Court will be moved to upset a conviction.

For a judge directly to restrain the press, a "clear and

present danger" to the "fair trial" rights of the defendant will have to be shown to pass First Amendment muster, according to the Court. A lesser standard, however, apparently is employed in the situation where a judge is asked to close a hearing or trial to the press and public. In this case, a "compelling government need" is all that is required to overcome First Amendment objections. Denial of the right of access to criminal trials and records apparently is not as offensive to the First Amendment as a prior restraint in the form of a gag order on the press. But is there a First Amendment right to attend a preliminary hearing when its coverage by the media would pose a threat to the Sixth Amendment rights of a suspect? And if there is such a right, can it withstand a trial court determination that the Sixth Amendment rights of the suspect are supreme?

The issues presented to the Court on courtroom access are tricky because of the Court's "caution, and of its philosophical disunity, when it confronts press cases," according to legal journalist Lyle Denniston. "The 'right to gather news' is not a hardy right precisely because of that hesitancy and that lack of abiding consensus."[60] Any attempt by traditionalists to describe and predict the Burger Court's approach to the areas of access and fair trial-free press, in addition, must be complicated by the Court's stated methodology for resolving the myriad issues within the individual disputes. The ad hoc balancing test, which has frustrated First Amendment scholars in their analyses of the Court,[61] is, as Justice Powell once admitted, "hardly an exact science."[62]

Press-Enterprise v. Superior Court (II)

Robert R. Diaz was charged with the murder of 12 hospital patients by administering massive doses of the heart drug lidocaine. At the opening of a preliminary hearing, Diaz's counsel moved to remove the press from the courtroom because reporting on the hearing would prejudice jurors who might be impaneled for his trial. Sec. 868 of the California Penal Code provides that upon a defendant's showing that exclusion of the public from a preliminary hearing is "necessary" to protect the defendant's right to a fair and impartial trial, the magistrate must close the courtroom. The judge in the Diaz case invoked the statute, a 41-day closed hearing was held and its transcripts were sealed.[63]

Seven months later, the Press-Enterprise Co. sought access to the transcripts of the hearing, and the prosecutor joined the motion, but the judge ruled that release of the transcript might "prejudice the defendant's right to a fair and impartial trial." He ordered the transcript to remain sealed and the Press-Enterprise Co. sought a write of mandamus from the California Supreme Court ordering the judge to release the transcript.[64]

The Press-Enterprise Co. argued that the First Amendment required that the hearing should have been open, citing as support Globe and Press Enterprise I. The California Supreme Court, however, reject the argument since (1) both precedents concerned trials rather than pretrial hearings and (2) neither involved denial of access to protect defendants from prejudicial publicity but rather the privacy rights of witnesses and jurors.[65]

The Court acknowledged that Sec. 868 required that openness was the rule and closure the exception, but when a defendant's constitutional right to a fair trial is weighed against the common law tradition of openness in courts, a legislatively created right of access, and, at best, a qualified First Amendment right to attend pretrial proceedings, "prejudice to the defendant remains the primary concern. 'No right ranks higher than the right of the accused to a fair trial.'"[66] The Court, in the end, refused to acknowledge a First Amendment right of access to preliminary hearings.[67]

Justice Allen E. Broussard, writing the Court opinion for four of the six justices, nevertheless instituted what he described as a "clear and present danger" test for situations in which Sec. 868 would apply. The statute required only that a judge determine "that exclusion of the public is necessary in order to protect the dedendant."[68] The legislature did not define "necessary," apparently leaving that function to the courts.[69] The Press-Enterprise Co. proposed that a judges should be required to find a "substantial probability of irreparable damage" to a defendant's Sixth Amendment rights.[70] The respondent's counter proposal was instead that a judge should find "a reasonable likelihood" of substantial prejudice for closure of a preliminary hearing.[71]

Broussard concluded that the plain meaning of the statutory language, the clear and present danger doctrine and the proposals by the parties to the case were essentially the same. He wrote:

> Once a defendant establishes a reasonable likelihood of substantial prejudice, there is a clear and present danger of prejudice, and the prosecution or media may overcome the defendant's showing by a preponderance of

> the evidence to the effect that there is no reasonable likelihood of prejudice.[72]

Justice Joseph R. Grodin concurred by disagreeing with the majority that the "First Amendment provides no right of access to preliminary hearings." But even if the First Amendment provides a greater right of access to preliminary hearings than Sec. 868, the majority's test for when a hearing can be closed was satisfactory.[73] Justice Malcolm M. Lucas concurred with the Court's judgment but dissented from the reasoning. Lucas said that the majority incorrectly accepted the trial court's use of a "reasonable likelihood" of prejudice test to satisfy Sec. 868's "necessary" requirement. Lucas added:

> Although a showing of actual prejudice may be difficult to marshall in advance of trial, certainly the defendant should be required at least to demonstrate a substantial probability of prejudice [in keeping with precedent]. . . . No such showing was made here.[74]

Lucas said he concurred with the judgment only because the trial (which was held without a jury) had been completed and therefore the issue was moot.[75]

The U.S. Supreme Court granted certiorari on Oct. 15, 1985[76] and held oral arguments on Feb. 26, 1986.[77] Press-Enterprise II posed two questions: (1) Does the public's First Amendment right of access to criminal proceedings extend to pretrial proceedings--in particular, preliminary hearings? and (2) Does the standard for closure of preliminary hearings under California Penal Code Sec. 868 violate the constitutional rights of the public, including the press?[78]

In its brief, Press Enterprise maintained that preliminary

hearings in California are more like trials than pretrial proceedings and therefore First Amendment and Sixth Amendment precedents by the Supreme Court should be applied to determining whether public and press access should be allowed.[79] The constitutional rights of access "cannot be arbitrarily foreclosed to the preliminary hearing simply by characterizing the proceeding as pre-trial," the brief said. "Rather the proceeding itself must be examined to determine if the principles sustaining the right of access to other court proceedings support access to the proceeding in question."[80]

The petitioner argued that the only difference between California preliminary hearings and trials was the final determination of guilt or innocence, and "the benefits derived from open trials are equally compelling at the preliminary hearing stage." Only one trial was actually held for every eight preliminary hearings during the 1983-84 fiscal year. As such hearings essentially have evolved into trials themselves, denying access to them raises difficult questions about accountability in the criminal courts.[81]

Thirteen friend of the court briefs were filed in the case, six of which were filed by news media and their organizations in support of the Press-Enterprise Co. In a brief filed by the general counsel for The Society of Professional Journalists, Bruce Sanford, writing for most of the amici, argued that "in contemporary America, the criminal justice process has become, for all practical purposes, a pre-trial process." To maintain public confidence in the criminal justice system, the public must have access to the pretrial process.[82]

The Riverside County counsel argued in its brief that the

Press-Enterprise II case was inappropriate for determination of the First Amendment right of access to preliminary hearings since the California penal code already provided the appropriate level of access.[83] The sole point of the case of the petitioner seemed to be an effort to give the right a "constitutional dimension" when the transcript was ultimately released anyway and no jury was impanelled to measure whether any prejudice occurred.[84] The respondent argued that the standard for closure adopted by the California Supreme Court in Press-Enterprise II was "directly in conformance with previous decisions of this Court which emphasize that courts should be open and that openness should bow only when higher values, such as a right to a fair trial are to be served."[85]

The brief stated that if the petitioner's argument were sustained by the Court, the right of access would lead to a demand for "unlimited access to the office of the district attorney because it is there that the fundamental decisions to prosecute or not to prosecute are made." Further, this would "lead to unwarranted and disruptive intrusions into all phases of the accusatory process."[86]

The county conceded that some similarities exist between preliminary hearings and trials, but they actually serve "vastly different goals." The latter determine guilt or innocence and the former protect the rights of the accused. The right of the public preliminary hearing rests with the defendant, not with the public.[87] The defendant's attorneys filed a brief in support of the county which argued that because preliminary hearings are largely devoted to the prosecution's case, most reporting on them tends to bias potential jurors against the defendant.[88]

Briefs filed by the county district attorney and the California attorney general acknowledged, in contradiction to the state supreme court, that the right of access to preliminary hearings had a First Amendment basis and that the standard used by the trial court in this case for determining access was inadequate to meet the constitutional challenge. But the district attorney and the attorney general maintained that the right was "qualified" and a careful balancing of interests was required.[89]

Analysis and Prediction

A projection for the outcome of a U.S. Supreme Court case should be based on several sources of data. Precedents, briefs and oral arguments traditionally are the criteria upon which decisions are made and therefore constitute valuable data. Other data, however, could be equally or more significant; voting patterns of the justices in previous similar cases, a general notion of the justices' collective and individual attitudes and ideologies, extrajudicial statements uttered by the justices on the issue, procedures employed by the Court in arriving at decisions, tenets of small group behavior and other knowledge about law, the Court and social psychology will be employed in the present study as it may be applicable. Unconstrained by the traditions of legal research, a predictor can consider far more variables than the lawyer or judge.

A fundamental assumption for this study is that the aggregate of the individual attitudes of the justices toward the issues

of fair trial-free press and the constitutional right of newsgathering will account for more of the cause of the outcome for Press Enterprise II than virtually any other factor. First, it must be determined whether the Court or its members can be said to have an attitude toward the referent or, put another way, whether the referent is capable of having an attitude toward it by the Court. Assembly and analysis of the Guttman scale should help answer the question.

The U.S. Supreme Court decided 12 nonunanimous cases affecting fair trial-free press and constitutional newsgathering between the October 1971 term and the October 1983 term. The cases were arranged in columns in degree of unanimity of outcomes, and the justices were arranged in rows in degree of voting favorableness.[90] See table.

Three of the justices had perfectly favorable voting records in these cases. Douglas, Marshall and O'Connor had or have always voted in favor of First Amendment claimants, although O'Connor has been asked only twice to vote, and Douglas is no longer on the Court. All three have perfect +1.00 "errorless" scale scores. Brennan is next most favorable with a 75 percent favorable voting record but only a +.50 scale score due mainly to his two voting inconsistencies. The only other justice with a positive and significant (albeit barely) scale score is Powell.

Two justices voted favorably more often than unfavorably, but Blackmun (63.6 percent) and White (58.3 percent) had insignificant +.17 scores. Stewart had voted as often in favor of Firs:

GUTTMAN SCALE FOR BURGER COURT ADJUDICATION
OF PRESS ACCESS CASES

Justice	Case	A	B	C	D	E	F	G	H	I	J	K	L	N	X-O	Errors	Scale Position	Scale Score
Douglas		X		X					X	X		X		5	5-0	0	12	+1.0
O'Connor			X				X							2	2-0	0	12	+1.0
Marshall		X	R	X	X	X	X	X	X	X	R	X	X	10	10-0	0	12	+1.0
Brennan		O	O	X	X	X	X	X	X	X	X	X	O	12	9-3	2	9	+ .50
Powell		X	X	X	R	X	X	O	X	X	X	O	O	11	8-3	1	8	+ .30
Blackmun		X	X	X	X	X	X	X	O	O	R	O	O	11	7-4	0	7	+ .17
White		X	X	X	X	X	X	X	O	O	O	O	O	12	7-5	0	7	+ .17
Stewart		X		X	X	X	X		O	O	O	X	O	10	5-5	1	5	- .17
Stevens			O		X	O	O	O			X		X	7	3-4	4	5	- .17
Burger		X	X	X	X	X	O	O	O	O	O	O	O	12	5-7	0	5	- .17
Rehnquist		X	X	O	O	O	O	O	O	O	O	O	O	12	2-10	0	2	- .67
		8-1		8-1		7-2		4-5		4-5		4-5		12	63-41	8		
			6-2		7-1		6-3		4-5		3-4		2-7					

CR = .93 X = Positive Vote O = Negative Vote R = Abstention [] = Not on Court

KEY TO CASES
A. Murphy v. Florida, 421 U.S. 794 (1975)
B. Patton v. Yount, 467 U.S. ___ (1984)
C. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)
D. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)
E. Philadelphia Newspapers, Inc. v. Jerome, 434 U.S. 241 (1978)
F. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982)
G. Gannett Co. v. DePasquale, 443 U.S. 368 (1979)
H. Saxbe v. Washington Post, 417 U.S. 843 (1974)
I. Pell v. Procunier, 417 U.S. 817 (1974)
J. Houcins v. KQED, 438 U.S. 1 (1978)
K. Branzburg v. Hayes, 408 U.S. 665 (1972)
L. Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978)

Amendment claimants as against them, and he too had an insignificant scale score. Stevens was the most inconsistent of the justices (four errors). He (42.9 percent) and Burger (41.7 percent) both voted more unfavorably than favorably and had insignificant scale scores (-.17). Rehnquist was clearly unfavorable (16.7 percent) in his voting in these cases and had a significant negative scale score.

The coefficient of reproducibility was .93, which is considered acceptable and supports the assumption that the Burger Court has had an attitude--largely favorable (60.5 percent of the votes cast in these cases were favorable)--toward fair trial-free press and constitutional newsgathering. On the basis of the Guttman scalogram, the Burger Court might be said to be fairly predictable in its favorableness toward the referent. Assuming that the best predictor of future behavior is past behavior,[91] the justices should be expected to vote favorably toward the First Amendment claim in Press Enterprise II. A number of complications, however, insert themselves into the actual application of the scale.

First, Douglas and Stewart are no longer members of the Court. Stewart was unpredictable in his attitude toward the referent, but Douglas was highly predictable. They have been replaced by Stevens and O'Connor. Stevens is possibly even more unpredictable than Stewart had been in this area. O'Connor had a perfectly favorable voting record, but it was based on only two cases, which is hardly reassuring for the purposes of a prediction.

Discounting O'Connor, only four of the present nine

justices can individually be said to be predictable on the issue. Three (Marshall, Brennan and Powell) can be described as likely to vote in favor of the Press-Enterprise Co. Rehnquist is likely to vote in favor of California. That leaves five unknown commodities--Blackmun, White, Stevens, Burger and O'Connor. Blackmun and White might vote favorably because they have done so more often than not in the past. Burger may vote unfavorably because of his past voting record. Stevens, like the chief justice, has voted unfavorably more often than favorably, but he voted inconsistently in over half of the cases. There are no bases for predictions of how O'Connor and Stevens will vote.

On the basis of this brief analysis, it appears possible that at least a majority coalition of Marshall, Brennan, Powell, Blackmun and White might be mustered in favor of the petitioner. Burger and Rehnquist are promising candidates for dissent. O'Connor and Stevens could go either way. This is not a prediction of the individual votes based on strong scale data, but the coefficient of reproducability and the overall outcomes of these cases suggest that the decision will be favorable. Press-Enterprise II is highly unlikely to be unanimous, regardless of the outcome.

These complications are somewhat unsettling for a prognosticator, and many more complications--some known and some unknown--can occur to undermine the data base. Justices can switch their votes any time until the opinions are actually published and issued, and some court historians have documented this. The assignment of the opinion, the opinion-drafting process, vote bartering and

interpersonal relationships between justices are just some of the variables that can influence a justice's vote even after the oral arguments and the secret Court conferences that cannot be accounted for.[93]

Even the issue upon which the best estimate suggests the case will be resolved can be discarded by the Court. Will Press-Enterprise II, for example, be resolved on the basis of the First Amendment when any number of other constitutional or procedural issues can control the case at the whim of the justices?[94] Veteran court students, however, understand that the best method for prediction will call for some subjective judgment by the predictor. The most clearcut scale can call for some common-sense adjustments, even though the Court is probably more readily predictable than not.[95]

Another monkeywrench that has an outside chance of spoiling the prediction is the tendency of the Supreme Court to overturn or at least vote contrarily to past cases that seem to have presented the same controversy as the case whose outcome is being predicted. Why else would the Court accept for review a case seemingly clearly controlled by the Court's own recent precedent? Is Press Enterprise II a natural extension of Gannett or Richmond Newspapers and their progeny or is it an opportunity for the Court clearly to delineate between pretrial conferences and trials for the purposes of First Amendment access?[96] Eight of the nine present justices participated in Gannett, but all nine participated in Richmond, Globe and Press-Enterprise I to begin a trend of openness in the judicial process. As Denniston has observed, "even those justices who seem to be most

in favor of press access are troubled about letting the notion run free."[97]

On the other hand, the compilation of other data that is known can partially make up for the unknown data. Even occasional students of the Burger Court, for example, appreciate that it is divided ideologically.[98] They know that Brennan and Marshall consistently stake out a liberal perspective on the court issues and vote accordingly. Marshall has always perceived access and fair trial-free press issues as opportunities to expand the rights of freedom of expression in the United States. Marshall has taken an expansive view of the right of access "to all aspects of the criminal trial" and to close a courtroom, a judge "should be obligated to show that the order in question constitutes the least restrictive means available for protecting compelling state interests."[99]

Brennan has also been a libertarian champion of the First Amendment, but he has disagreed with Marshall on two occasions. Once, he merely disagreed on a technical interpretation of a congressional enactment,[100] but the other disagreement is more significant for the purposes here. Another part of the Warren Court legacy, which is best embodied in the present court by Brennan, has been concern for protection of the constitutional rights of criminal defendants. In Murphy v. Florida,[101] Brennan felt that prejudicial pretrial publicity raised a doubt about the impartiality of a defendant's jury.[102] Marshall was not as concerned, and another occasion to reconcile the two justices was missed when Marshall removed himself from Patton v. Yount.[104] Brennan committed his

other "error" in Patton, arguing that a jury was at least partially prejudiced against a defendant because of publicity.[105] Brennan, in a speech in 1979, expressed hesitation about extending the degree of First Amendment protection to "structural" elements of the communication process, such as gathering the news, that has been extended to "speech" aspects, for example, publication of news.[106] Brennan applied his structural model in the Globe case by requiring the trial judge to find only a "compelling state interest" in order to close a courtroom and do injury to the First Amendment rights of the press and public. This is a standard of far less severity than the clear and present danger test employed by the Court in the gag order situation, and of considerably less severity than the virtually absolute ban on gag orders that Brennan would have preferred in Nebraska Press Association v. Stuart.[107] Nevertheless, Brennan has been as uniformly favorable toward First Amendment interests in court access cases as has Marshall when restraints have been proposed for the press. The fair trial-free press cases that engage First Amendment discussions but involve only issues of whether Sixth Amendment rights have been jeopardized are another matter and not the prevailing issue in Press-Enterprise II.

The conservative wing of the Burger Court has consisted of Burger, Rehnquist and O'Connor, and their agenda has not been as sympathetic to press freedom causes as the liberals. The only two occasions on which Rehnquist voted favorably were when Brennan voted unfavorably--Murphy and Patton. This possibly is explainable by the conservative's concern with his or her perception that

the protection of criminal rights has been overzealous at the Court. Burger also voted favorably in these two cases, and one of O'Connor's two favorable votes came in Patton. For Rehnquist, the whole question of a constitutional right of access is easy to answer. "In my view," Rehnquist wrote in Gannett, "the lower courts . . . are free to determine for themselves the question whether to open or close the proceedings."[108] Rehnquist said simply "there is no First Amendment right of access in the public or the press to judicial or other governmental proceedings."[109]

The degree of agreement in voting and opinions between O'Connor and Rehnquist has been greater than between any other pair of justices since O'Connor came on the Court.[110] This high agreement is also true for First Amendment cases,[111] with very few exceptions, one being Globe. O'Connor's concurring opinion in Globe would so limit its precedental value[112] that she is not as likely to take a broad approach in Press-Enterprise II. In addition, O'Connor was particularly critical of the petitioner's case in oral arguments. When O'Connor asked the attorney for the newspaper whether he would propose that grand jury proceedings also should be opened since they have many of the same attributes as preliminary proceedings, the attorney answered: "Not at this point." "But you'll be back next year," she said.[113]

Burger has also favored the Rehnquist approach to constitutional issues, but he has been more likely to vote favorably than either Rehnquist or O'Connor. Some court observers, however, have noticed that Burger's role as chief justice sometimes intervenes on his voting behavior. If Burger were to dissent as often

as Rehnquist, he might be voting true to his feelings about the issues, but he also might be accused of leading dissent rather than unanimity at the Court. He also loses the important power of assigning the majority opinion to an author when he dissents. Perhaps in some important cases, the speculation continues, Burger is tempted to vote with the majority rather than throw away his vote to the losing side so that he can choose an author who is closer to Burger in philosophy than others or can choose himself.[114]

In several instances when Burger has assigned himself to write the Court opinion in First Amendment cases, a proliferation of concurring opinions or especially strongly stated and popular dissenting opinions have followed.[115] As the last to vote at the Court conferences, Burger is in a good position to gauge whether his opinion-assigning ability can be put to work for his cause. It's possible that if this speculation is correct, Burger will go along with the majority's decision. His votes in Cox (8-1), Philadelphia Newspapers (7-2)[116] and especially Richmond Newspapers (8-1) offer the possibility that he would be willing to allow access for the public and press at a price of only possible harm to a criminal defendant's rights. His reluctance to allow the First Amendment to more clearly control the outcome in Richmond Newspapers and his straightforward concurring opinion in Gannett, however, raise serious doubts.[117]

Throughout most of the history of the Burger Court, the so-called "centrists" or the "swing votes" of Stewart, White, Blackmun, Stevens and Powell have exerted the most influence.

They all, for different reasons, have generally voted conservatively but occasionally, or for certain periods more often than that, have joined the Brennan-Marshall bloc on the Court, in part or in whole.

Powell seems to have been the most cognizant of the First Amendment implications in the media's legal problems of newsgathering. In fact, his 72.7 percent favorable voting in these cases and his marginally significant +.3 scale score promote him as the most likely to defect from the middle or conservative blocs in Press-Enterprise II. Two of his three[118] unfavorable votes are significant on their surface, but closer examination tends to diminish the hesitancy about counting him as a favorable voter in this case. In Branzburg, Powell's concurring opinion cautions judges to be scrupulous about the First Amendment rights of journalists in approving subpoenas to require them to testify before grand juries.[119] Called "enigmatic" by Stewart in his influential dissenting opinion, Powell's concurring opinion goes far beyond the majority's insistence that little if any potential harm to the journalist's First Amendment rights occurs when he or she is subpoened to testify. Powell's vote said one thing, his opinion something entirely different. The vote allowed the government to continue subpoening journalists without reckoning with stiff First Amendment requirements yet did not allow the Branzburg plurality completely to control the destiny of the involvement of the First Amendment in this and related issues.[121]

In Gannett, Powell's concurring opinion said: "I would

hold explicitly that petitioner's reporter had an interest protected by the First and Fourteenth Amendments in being present at the pretrial suppression hearing."[122] This goes beyond what the California Supreme Court decided, but Powell would agree that upon a showing of a "serious danger to the fairness of the defendant's trial"[123] or when fairness "is likely to be jeopardized by publicity" by the presence of the public and press,[124] then closure may be appropriate. Powell also would require that judges consider alternatives to closure, that closure be carefully limited, that a transcript be released promptly, that a burden be placed on the government or defendant to establish possible prejudice and a burden be placed on the media to show that alternatives would work. Powell also would require that due process rights be accorded to the media (e.g., hearings and appeals) before implementing a closure order or proceeding with a criminal prosecution.[125] In Gannett, Judge DePasquale "fully comported" with Powell's conditions and therefore Gannett's First Amendment rights were not violated. Since the trial court in Press-Enterprise II accorded some of Powell's conditions to the media, Powell may be able to sustain the California Supreme Court decision while disagreeing with its denial that the First Amendment had been implicated by the closure. This, however, would be a notable departure from Powell's overall voting pattern up to this point.

Blackmun's vigorous dissent in Gannett seems to assure his favorable vote in Press-Enterprise II. Blackmun's opinion in Gannett is situated in the center of some extra-judicial observations

about the small-group behavior of the Court that may have some meaning for the prediction of the outcome of Press-Enterprise II.[126] First, the length and breadth of Blackmun's investigation is in keeping with his reputation as a laborious writer of opinions, but generally he has saved these efforts for majority opinions. Popular Supreme Court building gossip at the time of the Gannett decision was that in fact his opinion was the majority opinion until one or more justices defected to the other side during the process when opinions are circulated among the justices.

Blackmun, in the end, submitted the tome as his dissenting opinion, in which the other three dissenters--White, Brennan and Marshall--joined solidly. The minority actually appeared much more united than the majority because four opinions were written by the five prevailing justices. Stewart's majority opinion is too ambiguous and cryptic to have been originally designed to serve as the Court's opinion.

Other gossip at the time suggested that for the first time in memory, court personnel were tempted to violate the justices' strict rule of secrecy during their private conference on the Gannett case because noise from the room indicated physical violence by the justices might break out. The sanctity of the conference room, however, was not intruded upon, and perhaps the mystery of the spat will never be revealed by the close-lipped justices who were the only eyewitnesses.[127]

Gannett also prompted Burger, Blackmun, Powell and Stevens to contradict each other in explanations of the case on the speaking

tour during the summer recess of 1979. When it is rare that even one justice will so much as briefly comment on a Supreme Court case, this public display of disagreement between four justices on both sides of the issue suggests some fundamental dissonance at the Court.[128] Blackmun, in his dissenting opinion in Gannett, at any rate, refused to "reach the issue of First Amendment access"[129] but his analysis of the Sixth Amendment right of the public and press to have access to preliminary hearings is so far reaching and the standard for closure so high that he should easily be able to embrace the Press-Enterprise's cause, if not its constitutional origin. In addition, Blackmun dwelt on the unusual nature of what California calls a "preliminary" hearing at oral arguments.[130] Blackmun's slow but distinct drift away from the Burger end of the Court's ideological spectrum also makes him a more likely candidate to join a Marshall or Brennan than a Burger or Rehnquist.[131]

White's voting record on the Guttman scale is identical to Blackmun's record. Both have been reluctant to extend a right of access to most newsworthy places. White, writing for the plurality in Branzburg, emphatically proclaimed:

> Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal.[132]

White and Blackmun practiced what they preached in Branzburg about newsworthy scenes in Houchins, Pell and Saxbe, but they have consistently held for the media in the court access cases, Gannett, Richmond, Globe and Press-Enterprise I. Both are more likely

prepared to follow this logic into Press-Enterprise II than to equate this with the non-court access cases. They also have not shown an unusual amount of sympathy for criminal defendants caught in the midst of prejudicial publicity, like Brennan. So evidence from beyond the scale hints that White may join the liberal group.

Stevens is the last justice to be discussed. Four of his seven votes were inconsistent, and he voted favorably in 42.9 percent of the cases. His line of logic is virtually impossible to trace. Stevens perhaps made the most favorable statement concerning the right of access in Houchins, in which he made parallel a sheriff's refusal to give a tour of a jail on demand by journalists with a prior restraint. Stevens, joined by Brennan and Powell, wrote: "An official prison policy of concealing [information about its operation] . . . from the public by arbitrarily cutting off the flow of information at its source abridges" the First Amendment.[133] Yet, unlike Blackmun and White, who did not go along with the First Amendment right of access to jails, Stevens rejected such a right in the courts in Globe and Gannett. He also agreed with Brennan in Patton that prejudicial publicity had raised a question of constitutional magnitude about the fairness of a defendant's trial. Stevens has been observed in other studies as a "maverick" voter who tends not to agree consistently with anyone else in particular.[134]

A review of some of the justices' voting behavior, opinions and off-court statements lends some additional, but not completely satisfactory, confidence to a prediction that Press-Enterprise II will be decided favorably for the First Amendment claimant. Marshall and Brennan are most likely to vote favorably. The

only possibility that they will not is that they will either view access as a clear and present danger to the Sixth Amendment rights of criminal defendants or as a potential threat to the very secrecy the Supreme Court uses in its own deliberations. Powell is next most likely to vote favorably unless he views the actions of the Riverside County Superior Court to have satisfied his First Amendment threshold showings to justify closure set out in Gannett.

Blackmun and White also seem more likely to join the liberals than the conservatives. Even though Blackmun and White have virtually identical voting records and scale scores, Blackmun, more than White, should favor the media in the case because of Blackmun's dissenting opinion in Gannett. O'Connor, despite her perfect and positive scale score probably will return to the conservative fold, an opening she allowed for herself in Globe. Burger, next to Rehnquist, is the least likely to vote in favor of the Press-Enterprise Co. Perhaps the decision of whether to concede the opinion-assignment power to someone else will control his vote. Rehnquist is almost sure to vote unfavorably. Therefore, the Press-Enterprise Co. should win the case by a vote of about 6-3.

Discussion

Legal, scientific and social scientific theories may not be so different in their purposes; broadly, they each attempt to explain and predict phenomena. Scientific theories look at physical or biological phenomena, for example, Einstein's theory of relativity or Edison's theory of electricity. Scientists must be able to describe radiation or electricity before they can predict

and manipulate to make use of the phenomena.

Social psychologists also must explain and predict individual and social behavior in order better to understand the human condition. Heider's theory of attribution or Allport's theory of personality provides at least hints as to why people and society behave as they do. Law has been described by some of its twentieth century students as a social science, but its constitutional foundation establishes a pretense that it is above the vagaries of human beings. The legal system's twin pillars of justice and liberty are tributes to authoritarian acknowledgement of the importance of individuals within a society, but Emerson's "system" for freedom of expression or Meiklejohn's "political speech" doctrine describes and predicts an ideal independent of those who minister and benefit from justice and liberty.

The highest law is the U.S. Constitution, a document of few words that presumably guided the conduct of a complex nation for 200 years; but it is an intensely political and human document written by humans to govern humans and interpreted and applied by nine humans sitting as the Supreme Court. Like the phenomena of physical and human behavior, the phenomenon of law can and should be predictable, although not only in the sense that the notion of stare decisis indicates that it is.[135] Rather it is predictable because the constitution is what the Supreme Court says it is; law is what judges says it is. Judges are human, humans are predictable, and judges are predictable. "No person itself," legal philosopher John T. Noonan wrote, "the law lives in persons."[136]

A way to apply an attitudinal theory is to ascertain the attitudes of the justices to explain their past behavior and to predict their future behavior. The attitudinal referent of First Amendment access to pretrial hearings can be satisfactorily scaled, and based on scales, the outcome of the access case, Press-Enterprise v. Superior Court (II) can be predicted. The media should win their case by a vote of about 6-3.

Overall, the justices seem tied to their own minds. As Rohde and Spaeth noted:

> the justices usually are true unto themselves. Their personal policy preferences, as manifested in their attitudes and values, are highly stable and invariant. Their voting behavior is not random or quixotic. Viewed legalistically, the justices' choices do adhere to precedent. They will pick and choose among relevant precedents to be sure, but in exercising choice among alternative courses of action, each justice is personally consistent. If they were not, predictive accuracy would be much less than 85.9 percent of their votes. [Footnote omitted.][137]

Measurement error and bad judgment may account for the 14-15 percent inaccuracy, but it might also be an encouraging sign of principled independence at the Court.

If the prediction proves true, it would no more <u>prove</u> the attitudinal theory than would the prediction's failure <u>prove</u> the theory's falsehood. Either outcome would merely provide a measure of confirmation in a system of competiting theories, all of which can, of course, account for differing levels of explanation. Unless we attempt to account for the attitudinal theory, however, we can not fully understand the law of access to pretrial hearings or any First Amendment issue.

NOTES

1 See, e.g., Alacron, Gustafson & Messarra, Fair Trial vs. Free Press: Who's On First?, U. WEST. L.A. L. REV. 1 (1982); Note, Access to Pretrial Documents Under the First Amendment, 84 COLUMBIA L. REV. 1813 (1984); Note, Closure of Pretrial Suppression Hearings: Resolving the Fair Trial/Free Press Conflict, 51 FORDHAM L. REV. 1297 (1984); Note, Constitutional Law: First Amendment: Right of Access to Civil Trials, 23 DUQUENSE L. REV. 1227 (1985); Note, Constitutional Law: Limits for Public and Press to Attend Pretrial Proceedings, 23 WASHBURN L. J. 675 (1984); Note, Fair Trial and Free Press: The Courtroom Door Swings Open, 45 MONT. L. REV. 323 (1984); Note, The Free Press-Fair Trial Controversy: A New Standard for Closure Motions in Criminal Proceedings, 38 ARK. L. REV. 403 (1984); Note, Free Press-Fair Trial: A Proposal to Extend the Right of Access to Encompass Pretrial Proceedings, 52 U. CINN. L. REV. 524 (1983); Note, The First Amendment and the Mandatory Courtroom Closure in Globe Newspaper Co. v. Superior Court: The Press' Right, the Child Rape Victim's Plight, 11 HASTINGS CONST. L.Q. 637 (1984); Note, The First Amendment Right of Access to Civil Trials After Globe, U. CHICAGO L. REV. 286 (1984); Note, First Amendment Right of Access to Pretrial Proceedings in Criminal Cases, 32 EMORY L.J. 619 (1983); Kelly, Richmond Newspapers and the First Amendment Right of Access, 18 AKRON L. REV. 33 (1984); Kirch, Press Access to Courts, 4 CALIF. LAW. 34 (1984); Note, Media Gag Orders: Enhancing Fair Trials or Impeding a Free Press?, 26 ARIZ. L. REV. 933 (1984); Sherer, In Case They Ask: Handling News Media Requests to Copy Audio and Photographic Evidence, 53 J. KAN. BAR ASS'N 76 (1984).

2 D. Gillmor & J. Barron, MASS COMMUNICATION LAW 485-558 (4th ed. 1984).

3 Press-Enterprise Co. v. Superior Court, 37 Cal. 3d 772 (1984) cert. granted, No. 84-1560 (Oct. 15, 1985). In many of the references in the text, this case will be referred to as Press-Enterprise II, in keeping with the practice in legal writing to shorten the title of frequently cited cases and to distinguish the case from Press Enterprise v. Superior Court, 464 U.S. 501 (1984). That case will be referred to as Press-Enterprise I.

4 54 U.S.L.W. 3252 (1985).

5 News Note, Court Hears Arguments in Pre-Trial Hearing Access, 12 Med. L. Rptr. n.p. (No. 22, March 4, 1986).

6 Friedman, The Methodology of Positive Economics, in ESSAYS IN POSITIVE ECONOMICS 10 (1953). Cf. Tichenor, The Logic of Social and Behavioral Science, in RSEARCH METHODS IN MASS COMMUNICATION 14 (G. Stempel & B. Westley ed. 1981).

7 See generally T. Newcomb & P. Converse, SOCIAL PSYCHOLOGY 17-154 (1965).

8 Prediction of Supreme Court cases is not new, and attitudinal theories have not provided the only bases for making predictions. See, e.g., Kort, Quantitative Analysis of Fact Patterns and Their Impact on Judicial Decisions, 79 HARV. L. REV. 1595 (1966); D. Rohde & H. Spaeth, SUPREME COURT DECISION MAKING 145-156 (1976); Schubert, Policy Without Law: An Extension of the Certiorari Game, 14 STAND. L. REV. 284 (1964).

9 Although attitudinal theory requires that a clear distinction be made in the referent between the object of the attitude, e.g., the press in a press access case, and the subject, e.g., public access, the U.S. Supreme Court, which will be analyzed for its attitudes in this paper, has based its decision primarily on the situations "that gave rise to the litigation rather than upon the personal characteristics of the litigants themselves." D. Rhode & H. Spaeth, supra at note 8, at 157-60; Spaeth & Parker, Effects of Attitude Toward Situation Upon Attitude Toward Object, 73 J. PSYCH. 173 (1969).

10 Gillmor & Dennis, Legal Research and Judicial Communication, in POLITICAL COMMUNICATION 299-300 (S. Chaffee ed. 1975).

11 Gillmor & Dennis, Legal Research in Mass Communication, in Stempel & Westley, supra at note 6, at 330-335.

12 Id. at 332.

13 For a good explication of the traditional norms associated with decision-making of the U.S. Supreme Court, see R. Jackson, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT (1955).

14 Shapiro, Political Jurisprudence, 52 KY. L.J. 294 (1964).

15 See, e.g., C. Pritchett, THE ROOSEVELT COURT (1948); G. Schubert, THE JUDICIAL MIND (1965); Rohde & Spaeth, supra at note 8. In the area of the First Amendment, see M. Shapiro, FREEDOM OF SPEECH (1966).

16 The Supreme Court citations to Thomas Emerson, Zechariah Chafee and Alexander Meiklejohn indicate the success of some traditional theorists, although given the Court's well-known and sometimes

sinister ability to manipulate documentation, the influence might be similar to the Bible's all-purpose utility in various arguments. Furthermore, almost every law journal seems to publish at least one article a year to attempt to influence the law of freedom of expression. Few articles ever see the impact of so much as one footnote in any court opinion.

17 See, e.g., Court Handicappers: Computer Predictions of Supreme Court Decisions, 84 NEWSWEEK 53 (Aug. 12, 1974); D. Rohde & H. Spaeth, supra at note 8, at 145-55.

18 Cf. Stempel, A Guttman Scale Analysis of the Burger Court's Press Decisions, 59 JOURN. Q. 256 (1982); Schwartz, The Supreme Court and the First Amendment, in COMMUNICATION YEARBOOK 7 18 (R. Bostrom ed. 1983).

19 See generally G. Schubert, THE JUDICIAL MIND (1964); Rohde & Spaeth, supra at note 8, at 161-68.

20 G. Schubert, JUDICIAL BEHAVIOR 554 (1964).

21 Id. at 555.

22 As will be made clearer infra, only nonunanimous cases will be scaled because unanimous cases do not reveal differences between votes of justices and tend artificially to inflate the test for significance. Unanimous fair trial-free press and newsgathering cases during this period included Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984); Seattle Times Co. v. Rinehart, 467 U.S. ___, 104 S. Ct. 2199, 81 L.Ed.2d 17 (1984); Oklahoma Publishing Co. v. Superior Court, 430 U.S. 308 (1977); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Waller v. Georgia, 467 U.S. ___, 104 S. Ct. 2210, 91 L.Ed.2d 31 (1984). Ten cases are considered the

minimum number necessary to produce a satisfactory scale. G. Schubert, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR 279 (1959).

23 Branzburg v. Hayes, 408 U.S. 665 (1972).

24 Patton v. Yount, 467 U.S. ___ (1984), 104 S.Ct. 2885 81 L. Ed.2d 847 (1984).

25 Rohde & Spaeth, supra at note 8, at 92.

26 N. Nie, et al., SPSS: STATISTICAL PACKAGE FOR THE SOCIAL SCIENCES 529 (2d ed. 1975). Admittedly, Press Enterprise II cuts across several agreed-upon subtopics of mass communication law; newsgathering and fair trial-free press are the most popular labels for two of the areas. The issue of access to a pretrial hearing triggers both areas to be sure but only a few of the scale cases also touch both areas or more. I will rely on the scale to justify whether cases selected for it are in fact one attitudinal referent.

27 Guttman, A Basis for Scaling Quantitative Data, 9 AMER. SOCIOLOGICAL REV. 139 (1944).

28 Rohde & Spaeth, supra at note 8, at 140-41.

29 G. Schubert, QUANTITATIVE ANALYSIS 271 (1959). The elimination of unanimous cases also eliminates the need for another statistic--Minimal Marginal Reproducability, which is intended to reduce the impact of unanimous responses on Guttman scales.

30 Id. at 272.

31 Rohde & Spaeth, supra at note 8, at 140-41.

32 For a thorough explanation of the case, see text accompanying footnotes 63-89.

33 For a recent discussion of the reality of the threat of prejudice, see Pember, Does Pretrial Publicity Really Hurt?, 23 COLUM. J. REV. 27 (1985).

34 360 U.S. 310 (1959).

35 366 U.S. 717 (1961).

36 384 U.S. 333 (1966).

37 Irvin v. Dowd, 366 U.S. at 727.

38 Sheppard v. Maxwell, 384 U.S. at 355.

39 See Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Bridges v. California, 314 U.S. 252 (1941); Cf. United States v. Dickinson, 465 F.2d 596 (5th Cir. 1972); Federated Publications v. Swedberg, 633 P.2d 74 (Wash. 1981); ABA Legal Advisory Committee on Fair Trial and Free Press, The Rights of Fair Trial and Free Press (1969), rev., Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press (1975).

40 See, e.g., Murphy v. Florida, 421 U.S. 794 (1975); Dobbert v. Florida, 432 U.S. 282 (1977); Waller v. Georgia, 467 U.S. ___, 104 S. Ct. 2210, 81 L.Ed.2d 31 (1984).

41 Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977).

42 443 U.S. 368 (1979).

43 Also see Waller v.Georgia, 467 U.S. ___, 70 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

44 448 U.S. 555 (1980).

45 Zemel v. Rusk, 381 U.S. 1 (1965).

46 Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

47 Houchins v. KQED, 438 U.S. 1 (1978).

48 408 U.S. 665 (1972).

49 Id. at 681.

50 Id.

51 457 U.S. 596 (1982).

52 Id. at 604-05.

53 Id. at 611 (O'Connor, J., concurring).

54 Id. at 607-08.

55 42o U.S. 469 (1975).

56 435 U.S. 589 (1978).

57 464 U.S. 501 (1984).

58 88 STAT. 1696.

59 This statement is much more true of the Warren Court than the Burger Court. See, e.g., Muprhy v. Florida, 421 U.S. at 804 (1975) (Brennan, J., dissenting).

60 Denniston, A Restrained Right, 68 QUILL 13 (1980).

61 See, e.g., Emerson, First Amendment Doctrine and the Burger Court, 68 CAL. L. REV. 440 (1980).

62 Herbert v. Lando, 441 U.S. 153, 188 (Powell, J., concurring).

63 Press-Enterprise Co. v. Superior Court (II), 37 Cal. 3d 772, 774 (1984).

64 Id.

65 Id. at 775-76.

66 Id. at 776, quoting Press-Enterprise v. Superior Court (I), 464 U.S. at 508.

67 Id. at 777.

68 Id. (Emphasis is Broussard's.)

69 Id. at 779.

70 Id. at 778.

71 Id.

72 Id. at 782.

73 Id. (Grodin, J., concurring).

74 Id. at 783 (Grodin, J., concurring and dissenting).

75 Id.

76 54 U.S.L.W. 3252 (1985).

77 12 Med. L. Rptr. n.p. (No. 22, March 4, 1986).

78 54 U.S.L.W. 3068 (1985).

79 12 Med. L. Rptr. n.p. (No. 19, Feb. 11, 1986).

80 Id.

81 Id.

82 Id. Also see amicus brief for petitioner at 2.

83 Brief for respondent at 1-2.

84 Id. at 6.

85 Id. at 9.

86 Id., supra at note 79.

87 Id.

88 Id.

89 Id.

90 Two adjustments were made in the orderings to accomplish

the most symmetrical matrix. Case B was moved to the left four places and Case K was moved to the right two places.

91 Actually this is much more than an assumption; it is a basic premise of social pyschology. As for judges, see Goldman, The Effect of Past Judicial Behavior on Subsequent Decision-Making, 19 JURIMETRICS J. 208 (1979).

92 See, e.g., W. Howard, MR. JUSTICE MURPHY 291-94, 484 (1968).

93 See generally, W. Murphy, ELEMENTS OF JUDICIAL STRATEGY (1964).

94 Rohde & Spaeth, supra at note 8, at 147.

95 Id. at 148.

96 Id. at 150.

97 Denniston, supra at note 60, at 13.

98 See, e.g., Denniston, Allies Waver on Access, 70 QUILL 19 (1982).

99 Press Enterprise Co. v. Superior Court (I), 464 U.S. at 520 (Marshall, J., concurring) (Emphasis is Marshall's).

100 Nixon v. Warner Communications, Inc., 435 U.S. 589, 611 (White, J., concurring), 612 (Marshall, J., dissenting).

101 421 U.S. 794 (1975).

102 Id. at 804 (Brennan, J., dissenting).

103 Id. at 794.

104 467 U.S. ___, 104 S. Ct. 2885, 81 L.Ed.2d 847 (1984).

105 Id. at 81 L.Ed.2d at 859.

106 William J. Brennan, Jr., Speech at the dedication of the Samuel I. Newhouse Law Center, Rutgers University, Newark, N.J., Oct. 17, 1979, reprinted as The Symbiosis Between the Press and the Court, NAT'L L. J., Oct. 29, 1979, at 15, col. 1.

107 427 U.S. at 572 (Brennan, J., concurring).

108 443 U.S. at 403 (Rehnquist, J., concurring).

109 Id. at 404.

110 Schwartz, A First Look at Sandra Day O'Connor and the First Amendment (1983) (unpublished paper presented at the annual meeting of the Ass'n for Education in Journalism and Mass Communication, Corvallis, Ore.).

111 Id.

112 See text accompanying note 53.

113 Supra, note 77.

114 See, e.g., Haines, Rolling Back the Top of Chief Justice Burger's Opinion Assignment Desk, 38 U. PITT. L. REV. 631 (1977); Schwartz, Warren E. Burger: Editor-in-Chief Justice of the United States? (1982) (unpublished paper presented at the annual meeting of the Ass'n for Education in Journalism and Mass Communication, Athens, Ohio).; B. Woodward & S. Armstrong, THE BRETHREN 417-22 (1979); Alschuler, Some Criticism Ill-Founded, NAT'L L.J., Feb. 18, 1980, at 19.

115 In regard to fair trial-free press especially, see Richmond Newspaper, Inc. v. Virginia, 448 U.S. 555 (1980); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Woodward & Armstrong, supra at note 114, at 421-23; Schmidt, Nebraska Press Association: An Expansion of Freedom and Contraction of Theory, 29 STANFORD L. REV. 431 (1977).

116 434 U.S. 241.

117 443 U.S. at 394 (Burger, C.J., concurring).

118 The third case is Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

119 408 U.S. at 709-10 (Powell, J., concurring).

120 Id. at 725 (Stewart, J., dissenting).

121 See generally, Gillmor & Barron, supra at note 2, at 413-28.

122 443 U.S. at 397 (Powell, J., concurring).

123 Id. at 399.

124 Id. at 400.

125 Id. at 400-01.

126 See generally, Comment, Gannett v. DePasquale, 7 HASTINGS CONST. L.Q. 339 (1980).

127 This gossip was reported in several daily newspaper articles and media trade publications in the summer of 1979. It was originally broadcast by ABC News.

128 Id. Also see . . . And Some Unprecedented Comments From the Court, 67 QUILL 6 (1979).

129 Gannett v. DePasquale, 443 U.S. at 447 (Blackmun, J., dissenting).

130 Supra, note 77.

131 See, Jenkins, A Candid Talk with Justice Blackmun, NEW YORK TIMES MAGAZINE, Feb. 20, 1983. at 20.

132 408 U.S. at 684-85.

133 438 U.S. at 38 (Stevens, J., dissenting).

134 See, e.g., Heck, Consensus and Conflict in the Supreme Court, in JUDICIAL CONFLICT AND CONSENSUS (S. Goldman & C. Lamb ed. 1985).

135 See, M. Shapiro, THE SUPREME COURT AND ADMINISTRATIVE AGENICES 67-71 (1968).

136 J. Noonan, PERSONS AND MASKS OF THE LAW 4 (1976).

137 Rohde & Spaeth, supra at note 8, at 150.